



**DEPARTMENT OF AGRICULTURE**

**Agricultural Marketing Service**

**7 CFR Part 930**

**[Doc. No. AMS-FV-15-0047; FV15-930-2 FR]**

**Tart Cherries Grown in the States of Michigan, et al.;  
Revision of Optimum Supply Requirements and Establishment  
of Inventory Release Procedures**

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Final rule.

**SUMMARY:** This rule implements recommendations from the Cherry Industry Administrative Board (Board) to add inventory release procedures and revise optimum supply provisions under the marketing order for tart cherries grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin (order). The Board locally administers the order and is comprised of growers and handlers operating within the area of production. This final rule establishes procedures for releasing inventory from reserves and increases the maximum carry-out volume available when calculating optimum supply from 20 million pounds to 100 million pounds. These changes provide clear procedures should an inventory release be necessary and provides more flexibility when calculating optimum supply.

**DATES:** Effective September 19, 2016.

**FOR FURTHER INFORMATION CONTACT:** Jennie M. Varela,  
Marketing Specialist, or Christian D. Nissen, Regional  
Director, Southeast Marketing Field Office, Marketing Order  
and Agreement Division, Specialty Crops Program, AMS, USDA;  
Telephone: (863) 324-3375, Fax: (863) 291-8614, or E-mail:  
Jennie.Varela@ams.usda.gov or  
Christian.Nissen@ams.usda.gov.

Small businesses may request information on complying  
with this regulation by contacting Richard Lower, Marketing  
Order and Agreement Division, Specialty Crops Program, AMS,  
USDA, 1400 Independence Avenue SW, STOP 0237, Washington,  
DC 20250-0237; Telephone: (202) 720-2491, Fax: (202) 720-  
8938, or E-mail: Richard.Lower@ams.usda.gov.

**SUPPLEMENTARY INFORMATION:** This final rule is issued under  
Marketing Order No. 930, as amended (7 CFR part 930),  
regulating the handling of tart cherries grown in the  
States of Michigan, New York, Pennsylvania, Oregon, Utah,  
Washington, and Wisconsin, hereinafter referred to as the  
"order." The order is effective under the Agricultural  
Marketing Agreement Act of 1937, as amended (7 U.S.C.  
601-674), hereinafter referred to as the "Act."

The Department of Agriculture (USDA) is issuing this rule in conformance with Executive Orders 12866, 13563, and 13175.

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is not intended to have retroactive effect.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15) (A) of the Act, any handler subject to an order may file with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. A handler is afforded the opportunity for a hearing on the petition. After the hearing, USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

This final rule adds inventory release procedures and revises the optimum supply and exemption provisions under

the order. This rule establishes procedures for releasing inventory from reserves and increases the maximum carry-out volume available when calculating optimum supply from 20 million pounds to 100 million pounds. These changes provide clear procedures should an inventory release be necessary and provides more flexibility when calculating optimum supply. The Board voted to recommend these changes to the Secretary at its meeting on June 25, 2015.

Section 930.50 prescribes procedures for calculating an optimum supply based on sales history to determine free and restricted percentages under volume regulation. As part of the process, the Board is required to determine the volume of fruit they anticipate would be necessary to have on hand at the end of the crop year. The order refers to this volume as carry-out inventory. This section currently specifies, in part, that the Board can consider a carry-out inventory of up to 20 million pounds, or another amount with the approval of the Secretary. This rule amends Section 930.151 to increase the maximum carry-out volume available when calculating optimum supply from 20 million pounds to 100 million pounds.

Section 930.54 of the order governs the use or disposition of inventory reserve cherries. Under this

authority, the Board can recommend to the Secretary that a portion or all of inventory reserve cherries be released if there is not sufficient fruit on the market to meet commercial demand. Sections 930.55 and 930.57 outline the provisions and requirements of the primary and secondary reserves, respectively. Further, no cherries in the secondary reserve may be released until all cherries in the primary reserve have been released. This rule creates section 930.154 to establish procedures for releasing inventory from reserves.

When volume regulation is in place, the restricted portion of the crop is either held in reserve by handlers or can be sold for exempt uses as authorized in the rules and regulations of the order. Reserves can be held over multiple crop years and are released when there is a shortfall in supply. While the Board maintains record of the volume in reserve, handlers maintain ownership of the reserve fruit.

All inventory reserves were released to meet demand following a crop disaster in 2012. The following year, the industry was still recovering and the Board did not recommend a volume regulation. When the Board recommended a volume regulation for the 2014-15 season to the

Secretary, and cherries were again being added to the reserve, the Board established a committee to review the procedures for releasing restricted inventory from reserves. The committee recommended to the Board that the procedures as previously developed by the Board be maintained, and that any release should first come from inventory currently in the primary reserve and then from any cherries designated for reserve from the current season if necessary.

Under these procedures, once the additional volume needed for release is established, the release should be apportioned among handlers based on each handler's prior three-year average of volume handled as a percentage of the industry's three-year average. For example, if a handler handled five percent of the previous three years' production, and the Board recommended a release of 20 million pounds, that handler would be authorized to release one million pounds of established reserves ( $.05 \times 20$  million). If a handler receives a release larger than what they have in the primary reserve, the excess amount would be reapportioned to those handlers with remaining primary reserve. If the handler in the scenario above had only 750,000 pounds in the primary reserve, the remaining

250,000 pounds would be reallocated to those handlers who still have inventory in the primary reserve.

The committee that reviewed the procedures for releasing restricted inventory from the reserves recognized that inventory reserves can be accumulated over a period of years. Therefore, the committee agreed releases should be based on the average amount handled during the three previous crop years, rather than using a year-to-year basis. The existing release procedures were crafted by the Board through a series of actions in past years and meetings. However, the procedures were not codified in the rules and regulations under the order. This rule adds the inventory release procedures to the regulations.

This recommendation was also thought to be the most equitable way to conduct releases. One Board member believed the releases should come from the current year's reserves prior to releasing from existing reserves, and did not support the recommendation. However, the Board recognized that during the crop year, complete information on reserves and shipment data would not be available. Thus, the Board recommended codifying inventory release procedures as recommended by the committee. The Board supported the recommendation by a vote of 17-1. This rule

adds a new Section 930.154 to the regulations to establish procedures for releasing inventory from reserves.

In addition to reviewing inventory release procedures, the Board discussed changes to some of its practices regarding calculation of optimum supply. Optimum supply is defined as the average free sales of the prior three years plus desirable carry-out inventory. Desirable carry-out is the amount of fruit needed by the industry to be carried into the succeeding crop year to meet marketing demand until the new crop is available. Desirable carry-out is set each year by the Board after considering market circumstances and needs. Section 930.50(a) currently specifies that desirable carry-out can range from 0 to a maximum of 20 million pounds, but also authorizes the Board to establish an alternative carry-out figure with the approval of the Secretary.

Since the promulgation of the order, the industry has seen new products and new segments emerge, such as dried tart cherries. As a result, at the end of a season there are multiple product lines that need to be supplied with tart cherries before the next harvest, which has impacted desirable carry-out. Desirable carry-out is the amount of fruit needed by the industry to be carried into the



succeeding crop year to meet marketing demand until the new crop is available.

In 2014, the Board used its authority to recommend to the Secretary a carry-out volume above the order-prescribed 20 million pound maximum for the 2014-2015 crop year. At that time, the Board estimated it was necessary to have 50 million pounds available at the end of the crop year to fulfill the needs of the industry. In discussing volume regulation for the 2015-2016 crop year, the Board agreed an increased carry-out was again necessary and recommended to the Secretary a 55 million pound carry-out when calculating the optimum supply.

In order to facilitate future carry-out needs without engaging in annual rulemaking, the Board recommended permanently increasing the maximum carry-out to 100 million pounds. Some members considered the 100 million pound upper limit to be too high, and voted against the recommendation. However, this action only increases the available range for the carry-out value from 0 to 20 million pounds to 0 to 100 million. This change will provide the Board with additional flexibility when considering the carry-out, but in itself does not establish a carry-out amount. The Board will still discuss and

recommend a desirable carry-out value that represents current industry needs each crop year. Consequently, the Board supported the recommendation by a vote of 12-5. This rule amends section 930.151 of the regulations to increase the maximum carry-out volume possible when calculating optimum supply from 20 million pounds to 100 million pounds.

### **Final Regulatory Flexibility Analysis**

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601-612), the Agricultural Marketing Service (AMS) has considered the economic impact of this action on small entities. Accordingly, AMS has prepared this final regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of businesses subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf.

There are approximately 600 producers of tart cherries in the regulated area and approximately 40 handlers of tart cherries who are subject to regulation under the order. Small agricultural producers are defined by the Small Business Administration (SBA) as those having annual receipts of less than \$750,000 and small agricultural service firms have been defined as those having annual receipts of less than \$7,500,000 (13 CFR 121.201).

According to the National Agricultural Statistics Service and Board data, the average annual grower price for tart cherries during the 2014-15 crop year was \$0.35 per pound, and total utilization was around 300 million pounds. Therefore, average receipts for tart cherry producers were around \$175,800, well below the SBA threshold for small producers. In 2014, The Food Institute estimated an f.o.b. price of \$0.96 per pound for frozen tart cherries, which make up the majority of processed tart cherries. Using this data, average annual handler receipts were about \$6.9 million, which is also below the SBA threshold for small agricultural service firms. Assuming a normal distribution, the majority of producers and handlers of tart cherries may be classified as small entities.

This final rule creates § 930.154 of the rules and regulations, establishing procedures for release of inventory reserves. This final rule also revises § 930.151 to allow the Board to consider a carry-out of up to 100 million pounds when calculating optimum supply. These changes are intended to provide clear direction in the event an inventory release becomes necessary and allow the Board to be more responsive to tart cherry market demand. The authority for these actions is provided in §§ 930.50 and 930.54 of the order.

It is not anticipated that this action will impose additional costs on handlers or growers, regardless of size. The implemented changes are administrative in nature and intended to align the provisions of the order with current industry practices. The addition of rules and regulations regarding inventory releases is a codification of administrative procedures the Board has had in place for many years. The expanded carry-out upper limit will allow the Board additional flexibility in meeting market needs without additional rulemaking.

The benefits of this rule are not expected to be disproportionately greater or less for small handlers or producers than for larger entities.

The Board discussed alternatives to these changes to the order, including releasing reserves from the current crop year or releasing cherries in the order in which the fruit was put into reserve. A committee was established to review the reserve procedures, and it proposed using a three-year average percentage for each handler and releasing the previous crop years' reserves. The Board agreed that the committee's recommendation would be the most equitable solution. Regarding the carry-out limit, the Board considered not recommending a permanent change. However, the Board anticipates needing more than 20 million pounds of carry-out for the foreseeable future. A member suggested changing the motion to 80 million pounds, but that suggestion did not receive support. Thus, the suggested alternatives were rejected.

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the order's information collection requirements have been previously approved by the Office of Management and Budget (OMB) and assigned OMB No. 0581-0177, (Tart Cherries Grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin). No changes in those requirements as a result of this action

are necessary. Should any changes become necessary, they would be submitted to OMB for approval.

Accordingly, this action will not impose any additional reporting or recordkeeping requirements on either small or large tart cherry handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies.

As noted in the initial regulatory flexibility analysis, USDA has not identified any relevant Federal rules that duplicate, overlap or conflict with this final rule.

AMS is committed to complying with the E-Government Act to promote the use of the internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

The Board's meeting was widely publicized throughout the tart cherry industry and all interested persons were invited to attend and participate in Board deliberations on all issues. Like all Board meetings, the June 25, 2015, meeting was a public meeting and all entities, both large and small, were able to express views on these issues.

A proposed rule concerning this action was published in the **Federal Register** on June 15, 2016 (81 FR 38975). Copies of the rule were mailed or sent via facsimile to all Board members and tart cherry handlers. Finally, the rule was made available through the internet by USDA and the Office of the Federal Register. A 30-day comment period ending July 15, 2016, was provided to allow interested persons to respond to the proposal.

One comment was received during the comment period in response to the proposal. The commenter is an individual who supports the proposed action. The commenter described the proposed changes as positive for the industry. Accordingly, no changes will be made to the rule as proposed, based on the comment received.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: <http://www.ams.usda.gov/rules-regulations/moa/small-businesses>. Any questions about the compliance guide should be sent to Richard Lower at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

After consideration of all relevant matter presented, including the information and recommendation submitted by

the Board and other available information, it is hereby found that this rule, as hereinafter set forth, will tend to effectuate the declared policy of the Act.

It is further found that good cause exists for not postponing the effective date of this rule until 30 days after publication in the Federal Register (5 U.S.C. 553) because handlers are already putting cherries into reserve. This action also needs to be in place before the Board meets in September to discuss establishing volume control, including determining an appropriate carry-out figure. Further, handlers are aware of this rule, which was recommended at a public meeting. Also, a 30-day comment period was provided for in the proposed rule.

**List of Subjects in 7 CFR Part 930**

Marketing agreements, Reporting and recordkeeping requirements, Tart cherries.

For the reasons set forth in the preamble, 7 CFR part 930 is amended as follows:

PART 930 - TART CHERRIES GROWN IN THE STATES OF MICHIGAN, NEW YORK, PENNSYLVANIA, OREGON, UTAH, WASHINGTON, AND WISCONSIN

1. The authority citation for 7 CFR part 930 continues to read as follows:



Authority: 7 U.S.C. 601-674.

2. In § 930.151:

- a. Designate the current paragraph as paragraph (a);
- and
- b. Add a new paragraph (b) to read as follows:

**§ 930.151 Desirable carry-out inventory.**

(a) \* \* \*

(b) Beginning with the crop year starting July 1, 2016, for the purposes of determining an optimum supply volume, the Board may recommend a desirable carry-out inventory not to exceed 100 million pounds.

3. Section 930.154 is added to read as follows:

**§ 930.154 Release of inventory reserve cherries.**

(a) As provided in § 930.54, the Board may recommend a release of a portion or all of the primary and/or secondary reserve cherries. The total available reserves will be determined at the beginning of the crop year. The primary reserve as defined in §§ 930.55 and 930.150 must be depleted before the secondary reserve can be released. If a release is recommended, the recommended volume shall be apportioned to handlers on the basis of each handler's proportion of the total volume handled in the preceding three crop years.

(b) If a handler has less volume in reserve than is apportioned, the excess volume shall be reapportioned to those who still have volume in reserve until the total release is complete.

Dated: September 12, 2016

Elanor Starmer  
Administrator  
Agricultural Marketing Service

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